No. 354.

Brief for Cooper for Appellee

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1897.

Filed April 21, 1898.

T. B. MERRILL, AS RECEIVER OF THE FIRST NATIONAL BANK OF PALATKA, APPELLANT,

vs.

THE NATIONAL BANK OF JACKSONVILLE, APPELLEE.

BRIEF FOR APPELLEE.

J. C. COOPER,
Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

T. B. Merrill, as Receiver of the First National Bank of Palatka, Appellant, vs. The National Bank of Jacksonville, Appellee.	In Equity, No. 300.

BRIEF FOR APPELLEE.

Statement of the Case.

This was a bill filed by the National Bank of Jacksonville against T. B. Merrill, as Receiver of the First National Bank of Palatka. The purpose of the bill was to establish a claim against the assets of the said First National Bank of Palatka in favor of the complainant below, appellee in this court, to-wit, that the said appellee, complainant bank, should be allowed to prove its claim, without regard to the collateral, for the amount of the claim as it existed at the moment of declared insolvency. The Receiver and Comptroller decided that the appellee could only prove its claim and receive dividends based upon the amount of its claim, after deducting the

amount received upon the collateral. The appellee contested this method of declaring dividends. This suit was brought to establish the right of the appellee to dividends based upon the total amount of its claim, without regard to collateral. The bill shows that the appellee was a creditor of the First National Bank for one class of indebtedness, consisting of sundry drafts, amounting to $6,010.47, and for another class of indebtedness, consisting of certificates of deposit, loans and interest, amounting to $10,093.34, making a total of $16,103.81 due the appellee from the First National Bank of Palatka on the 17th day of July, 1891. The appellee held certain collateral to secure the said last mentioned indebtedness of $10,093.34; said collateral amounting to $10,896.22, according to the face thereof. Complainant collected a portion of the collateral after insolvency of the bank, leaving a balance due on its said indebtedness, so secured by collateral of $4,496.44. The Receiver and Comptroller allowed the appellee dividends on this balance and dividends on the unsecured indebtedness, but refused to allow dividends on the total indebtedness from the date of insolvency, to-wit: based on the sum of $16,103.81. The contention of the complainant below, appellee here, was that the Receiver should have allowed the appellee to have proven its entire claim of $16,103.81, and should have received pro-rata dividends on the entire amount thereof.

This suit is framed upon the case of the Chemical National Bank vs. Armstrong, 59 Fed. Rep., 372. That is a bill in equity, and for the very identical purpose to attain which the bill in the case at bar was filed. The Court in that case held, as follows: "The great weight of authority in England and this country is strongly opposed to the view that a creditor with collateral will be thereby deprived of the right to prove for his full claim

against an insolvent estate" (quoting a number of authorities). "The exact point which is common to all of the foregoing authorities, and which they all sustain, is that a creditor who has proved his claim against an insolvent estate under administration can collect his dividends without any deduction from his claim as proven for collections made from collateral after his proof of claim is filed."

The bill was first demurred to, and the demurrer overruled, whereupon the Receiver filed his answer simply, in effect, alleging that he had no power to allow the claim. He did not deny that the complainant offered to prove its claim for the full amount when the claims were first presented, but only alleged that it did not express its dissent until the 15th of March, 1894. He answered that he had realized assets to the amount of $176,317.91; that he had paid, without stating when, the sum of $31,561.33 for expenses of the receivership; that he had transmitted to the Comptroller, without stating when, the sum of $143,849.03, and that some of the assets still remained in his hands undisposed of, but the Receiver failed to set out in his answer any statement of the assets remaining in his hands, or what assets remained in his hands on the 15th of March, 1894, or what disbursements he had made after the 15th of March, 1894, when he admits he had full notice of complainant's contention as to the proper mode of ascertaining and allowing dividends.

The Court overruled the exceptions to the answer, in effect holding, that the notice to the Receiver of complainant's right to dividends upon the basis of the entire indebtedness due to complainant was not given until the 15th of March, 1894. Thereupon the cause was set down upon the bill and answer and the Court made its decree in accordance with the case of Chemical National Bank

vs. Armstrong, declaring and adjudging the claim of the complainant, to wit: that it was entitled to receive from the assets of the First National Bank of Palatka, dividends upon the basis of its entire indebtedness of $16,103.81, but in order that no possible injustice should be done the Receiver, it further decreed that this dividend should be payable only out of the assets which were in his hands, when he admits he received notice of complainant's contention, to wit: on the 15th of March, 1894.

The Receiver did not in his answer state what assets he had on hand on the 15th of March, 1894, or what disbursements he had made after the 15th of March, 1894, or what moneys he had sent to the Comptroller after the 15th of March, 1894. The Court treating him as a trustee, ordered him to file an account showing the assets and disbursements on and after the 15th of March, 1894, the date on which he admitted receiving notice of complainant's claim.

The United States Court made its decree on the 29th of January, A. D. 1896 (found on pages 17 and 18 of the record).

On the 14th of March, 1896, the defendant below, T. B. Merrill, as Receiver, entered his appeal from the said decree to the United States Circuit Court of Appeals for the Fifth Circuit and assigned as error:

1st. The overruling of the demurrer to the bill.

2nd The entry of the said final decree (Page 18 of record).

On June 15, 1896, the United States Circuit Court of Appeals, Fifth Circuit, made its decree and filed its opinion reversing the decree of the Court below as to the form of the said decree, but establishing the right of

the appellee, complainant below, to prove its claims and to a pro rata distribution upon the entire amount of its indebtedness.(See pages 22 to 30 of record inclusive.)

For the decree and opinion of the United States Circuit Court of Appeals of Fifth Circuit see page 21 and from page 22 to page 30 of the record, inclusive.

The United States Circuit Court of Appeals followed the case of Armstrong vs. Chemical National Bank, 59 Fed. Rep., 372 (16 U. S. App. 465).

In the latter case, it was held that the creditors of an insolvent National Bank in proving their claims cannot be required to allow any credit for collection from collateral made subsequent to the declared insolvency of the Bank and before the filing of the proof of claim.

On December 24th, 1896, the defendant below, the appellant here, T. B. Merrill, as Receiver, entered his appeal to the Supreme Court of the United States from the said decree and opinion of the United States Circuit Court of Appeals.

This appeal should be dismissed.

This case and the case between the same parties, number 301, involve the same record and the same subject matter as shown by said records.

After the United States Circuit Court of Appeals made its opinion and decree, dated June 15, 1896, (Pages 21 to 30 of the record), as shown by the record in case No. 301 on the docket of this Court on page 22 thereof, the mandate of said United States Circuit Court of Appeals was sent down to the United States Circuit Court and filed in that Court July 16, 1896, and thereupon and

before any appeal had been taken to this Court from said decision of the United States Circuit Court of Appeals, a final decree was entered in this cause in the United States Circuit Court, in conformity with said mandate. (See pages 23 to 24 of the record.) And from that decree the said appellant Merrill took his appeal to the United States Circuit Court of Appeals.

This appeal should therefore have been dismissed upon the following grounds:

The record shows that the appellant here was also the appellant in both of the appeals in the United States Circuit Court of Appeals, shown by the records here in cases Numbers 300 and 301.

The first decree and judgment of the United States Circuit Court of Appeals was made on the 15th of June, 1896, and is reported in the Federal Reporter, Vol. 75, p. 148. The mandate of the United States Circuit Court of Appeals was filed in the Circuit Court of the United States for the Southern District of Florida, July 8th, 1896. (See page 20 of the record.)

The appellant Merrill did not then take any appeal from the decree and opinion of the United States Circuit Court of Appeals, but permitted the mandate to be sent down to the Court below and the decree entered thereon in the United States Circuit Court on the 27th of July, 1896. (See pages 23 and 24 of the record in Case No. 301 in this Court.)

Such decree having been entered in the Court below, in pursuance of said mandate, and the cause having been

by this action remanded to the jurisdiction of the United States Circuit Court, the appellant waived any right of appeal from said judgment of the United States Circuit Court of Appeals of June 15th, 1896, and he ought not to be heard in this Court to complain of same where said decree has been entered in strict conformity to said mandate.

Aspen Mining & Smelting Co., vs. Billings, 150 U. S. 34.

In re Washington & Georgetown R. R., 140 U. S. 91.

Gaines vs. Rugg, 148 U. S. 228, 241.

Texas & Pacific Ry. vs. Anderson 149 U. S. 237.

We will consider the errors as assigned in the United States Circuit Court of Appeals and shown in the record on page 18.

ARGUMENT.

First assignment and first specification of errors too indefinite.

The first assignment, found on page 18 of the record, is in the following language: "First. Because the Court erred in rendering the decree overruling defendant's demurrer to the bill of complaint herein."

The first specification is as follows: "First. The overruling of the defendant's demurrer to the bill of complaint."

This assignment and this specification point out no error that this Court will examine. The office of an assignment of error and of the specification in the brief is

to indicate in the said assignment and in the specification the exact question sought to be raised and which the Court is asked to decide. This Court and other Federal Courts have held that where the assignment and specification does not point out the exact question to be decided, it will not be considered.

Noonan vs. Caldonia Mining Co., 121 U. S., 400.

Patrick vs. Graham, 132 U. S., 627.

City of Lincoln vs. Sun Vapor St. Lt. Co., 59 Fed. Rep., 758.

F. C. & P. R. R. Co. vs. W. B. Cutting, et al., 68 Fed. Rep. 586.

If the Court shall determine to examine the demurrer to the bill, and the argument in the brief for appellant thereon, we maintain that the demurrer was properly overruled. In the argument, the only contention made against the bill seems to be in alleged indefiniteness in the allegations of the bill. No such ground was raised in demurrer, and it does not appear in the demurrer.

(See page 7 of the printed record.)

The three grounds set forth in the demurrer were:

1st. Want of equity.

2nd. A denial of the rule of distribution, which had been decided in the case of Chemical National Bank vs. Armstrong.

3rd. Estoppel.

None of these contentions were well taken. The bill is sufficiently definite to have settled and decreed the basis on which the complainant was entitled to a dividend. The bill states the total amount of the indebtedness due complainant. It states separately the amounts

for which it held collateral, and those which were unsecured, and it states the amount received on the collateral and separately the dividends on the two classes of claims, which the Comptroller and Receiver has allowed and paid. This data gave the Court everything needed upon which to frame a decree. On the points actually made in the demurrer, and which demurrer was overruled, we assert the Court properly decided the demurrer was not well taken.

Appellee was entitled to prove its claim for the full amount without regard to the collateral.

The case of Chemical National Bank against Armstrong (59 Fed. Rep. 372), decided by the Circuit Court of Appeals for the Sixth Circuit, is conclusive of this case. The facts in both cases are almost identical. In that case, just as in the case at bar, the Chemical National Bank, a creditor of the defunct Fidelity National Bank, held certain collateral, which Armstrong, the Receiver of the Fidelity Bank, required it to collect and apply to the debt. and then to make proof of the balance of the debt. The lower court sustained the view of the receiver, but the Appellate Court (consisting of Circuit Justice Brown and Judges Lurton and Taft) reversed the holdings of the lower court, and permitted the Chemical National Bank to prove its claim without regard to the collateral it held.

Judge Taft, speaking for the Court, asks in this opinion: "Shall creditors of an insolvent national bank, in proving their claims, be required to allow any credit for collections from collateral made subsequent to the declared insolvency and before proof of claim."

This question is answered in the negative, the same Judge saying:

"The great weight of authority in England and in this country is strongly opposed to the view that a creditor with collateral shall be thereby deprived of the right to prove for his full claim against an insolvent estate."

The opinion in this case is an able and exhaustive review of all the authorities on the subject, and is an authoritative exposition of the law of the case at bar.

See Chemical Nat. Bank vs. Armstrong, 59 Fed. Rep. 372, and cases there cited.

The elements of an estoppel are not present in this case.

It is objected by the demurrer that the complainant is estopped to bring this suit, although upon what grounds the alleged estoppel rests it is not clear.

The bill does not show that the Receiver has been led by the acts of the complainant to take any position, or do any act, which he would not otherwise have done, and which resulted in an injury to the rights of the creditors. It is particularly and specifically alleged in the bill: "That in addition to proving the amount of $6,010.47 due on sundry drafts as aforesaid, your orator offered to prove up its claim for $10,000.00, being amount of certificate of deposit secured by collateral as aforesaid, but the said defendant Receiver would not permit your orator to prove the total amount of $10,000.00 and interest due thereon for said loan as aforesaid, but under the ruling of the Comptroller of the United States of America your orator was not allowed to prove its claim in full before the defendant Receiver, but was ordered to first exhaust the collateral given to secure said loan for $10,000.00 as aforesaid, and then to prove the claim for the difference between the amount of the loan and interest, and the amount realized from said collateral."

"That your orator gave due notice that it would demand a pro rata dividend upon the whole amount due your orator, without deducting the amount collected on collateral security, to wit: that it would demand a pro rata dividend upon $16,103.81 and interest thereon from the 17th day of July, A. D. 1891."

Nothing could be more specific than the allegations contained in the bill that the defendant had full notice of the complainant's claim at the time proof was made. The fact that complainant was forced for the time, by a species of duress, to be governed by the rulings of the Receiver, did not invest this case with the qualities of an estoppel. The other creditors of the insolvent bank have not been harmed, but rather benefited, by the rulings of the Receiver, and for the complainant to endeavor now to assert a perfect legal right of which it had been deprived by the action of the Receiver, is as far as it possibly could be from a case of estoppel.

The same contention, which is sought to be made here against the complainant, was distinctly overruled by the Texas Civil Court of Appeals in the case of Hunt vs. Smart, 28 Southwestern Rep., 63, decided October 24th, 1894. In that case the appellee sought recognition as a preferred creditor, after having already proved his claim as a general creditor, the claim being sustained in the trial court. "The Receiver brings this case to us with the contention that the appellee has lost his right to a preference, and is estopped from claiming as a special creditor by reason of his action in proving up his claim before the Receiver, and allowing himself to be considered as a general creditor until after the assessment had been levied on each share of stock."

The Court dismissed the contention of the Receiver, saying: "That in order for an estopped to exist it must

appear that his action has led to a condition of things which would cause other creditors to lose some right if he is now being admitted to a preference."

It is true the payment of the claim in full, says this Court, would reduce the dividends of the other creditors, but the right of priority exists from the accrual of the preferred claim, and the remaining creditors lost no rights or advantages by allowing the appellee's claim, since they never had any rights or advantages over him. "On the contrary, if the appellee is refused preference, they (the other creditors) will acquire an advantage not justly due to them."

This reasoning applies with irresistible force to this case. Especially so, since the allegation is made with all possible distinctness that the complainant offered, in the first instance, to prove its claim for the full amount, which the Receiver would not permit.

This is a trust estate.

The trust sought to be enforced by the bill is still open and unexecuted. The Receiver was at the time the bill was filed, and still is, in possession of the assets of the defunct bank. The assets of the bank have not yet been fully distributed, and one of the grounds upon which this bill rests is the delay in closing the affairs of the bank. From the time of the payment of the first dividend to the filing of the bill there has been only one year and nine months, a period entirely insufficient to raise any presumption of laches by complainant.

It is shown by the bill that the Receiver is still in the active management of the bank. His position is that of a trustee administering an active trust, and any bene-

ficiary of that trust has a right to apply to the proper court to have the trust administered in accordance with law. So long as this trust is in the process of administration, the complainant has an undoubted right to have the Receiver's acts controlled by this Court. Any other doctrine would result in depriving the complainant and every other creditor of the bank of the protection of the Court from the unauthorized and illegal acts of an officer in the discharge of a trust.

"Laches is not like limitations, a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced—an inequity founded on some change in the conditions or relations of the property or the parties."

Galliher vs. Caldwell, 145 U. S., 368.

Godden vs. Kimmell, 99 U. S., 201.

Mackall vs. Casilear, 137 U. S., 556.

In this case the enforcement of the complainant's rights would work injury to no one. On the contrary, it would be highly inequitable to debar this, and all other creditors similarly situated, from availing themselves of the protection of this Court from the arbitrary and illegal acts of the Receiver.

The authorities cited by the appellants in the United States Circuit Court of Appeals to sustain the demurrer, to wit: Commonwealth vs. Mechanics National Bank, 94 U. S., 437, have no application. That was a suit by one bank against another, to wit: by a creditor bank against an insolvent bank for interest but it does not hold that the creditor may not treat the Receiver as the trustee of the property within the jurisdiction of the Court, and have its claim adjudicated in a suit against the Receiver.

The other case cited by the appellant in the United States Circuit Court of Appeals of Hitz vs. Jenks, 123, U. S., 297, in no respect sustains the demurrer to the bill. This was an effort by the receiver to enforce a deed in the nature of a mortgage, and to cancel certain deeds made after the mortgage, and by cross-bill by the defendant, Mrs. Hitts, to cancel the mortgage. The Court decided that the notary's certificate could not be disputed. which set forth the private examination of a married woman, and properly held that all of the rents of the property were applicable to the mortgage indebtedness. There is nothing in this decision which conflicts with the numerous decisions in which Receivers of national banks have been treated as trustees and sued as such.

The United States Circuit Court had power to enter a decree against the Receiver.

In the cases of Armstrong vs. American Exchange Bank, 133 U. S., 433, decrees against the Receiver Armstrong were affirmed.

In one case (see page 438) the prayer of the bill was for a decree that the claim with interest be adjudged a valid claim against the estate in the hands of the defendant as receiver, and that he be directed to satisfy it by paying dividends upon it from the assets of the Fidelity Bank. After a hearing on pleadings and proofs, a decree was entered (see page 439) directing the Receiver to allow the claim for the full amount against the assets in his hands as Receiver, and to satisfy it by paying such dividends as he had made theretofore and as should be made thereafter from the assets of the Fidelity Bank, in the due course of administration, and to pay the dividend of 25

per cent already declared with interest from that date to date of payment.

In the other case (see page 440) the prayer of the bill was for a decree that the claim is a valid claim against the assets in the hands of the defendant as Receiver, and that he be directed to satisfy it by paying dividends upon it from the assets of the Fidelity Bank in the due course of administration. The decree in this case, found on page 443 of the opinion, adjudges that the claim is a valid one for the full amount against the assets in the hands of the defendant as Receiver, and directs him to satisfy the same by paying thereon such dividends as had been made theretofore, and should be made thereafter from the assets of the Fidelity Bank in the due course of administration, and to pay the dividend *already declared*, with interest from that date until the time of payment.

The Court examined the facts in all these cases and decided (see page 459) that the decree in the first case was right, and on page 470 decided that the Circuit Court was right in making a decree against the Receiver in number 111 and affirmed the right of the complainant to interest on the dividend theretofore declared, and that both the decrees be affirmed.

In both of these cases demurrers had been interposed and overruled, dividends of 25% had been paid to the other creditors some time before these were adjudicated in favor of complainants in those suits, but the Court below and Circuit Court of the United States entered decrees against the Receiver, and ordered him to pay out of the assets not only the dividends thereafter accruing, but those theretofore accrued, with interest. We think it is therefore clear that the Receiver is treated as a trustee administering the assets of an insolvent estate, and when it

is necessary for a creditor to go into Court to establish his rights, he may get a decree against the assets.

Assets of insolvent banks subject to decrees of United States Courts.

In case of Richmond vs. Irons, 121 U. S. page 127, a bill by creditors to enforce stockholders liability was sustained and while the suit was pending, a receiver of the bank was appointed. The court treats the assets of an insolvent bank as subject to distribution under the decrees of a court of equity, on general equity principles.

In the case of National Bank vs. Colby (21 Wallace 609), it was determined that the title to the assets of the bank was transferred to the Receiver.

In the case of Pacific National Bank vs. Mixter, 124 U. S., page 724, the assets are treated as passing to the Receiver.

In Scott vs. Armstrong (146 U. S., 499) the Supreme Court of the United States upheld the right of set-off of creditors of the bank against suits brought by a Receiver of the bank.

If the Receiver can sue the debtors of a bank, and the debtor may by a cross action, in the nature of a plea of set-off, recover against the Receiver, there can be no reason why suit may not be maintained in the first instance by creditors of the bank against the Receiver for distribution of the assets of the bank.

The case of Hunt vs. Smart, 28 S. Rep., 63, is a suit against a Receiver of an insolvent National Bank, to establish a preferred claim, and was sustained by the Court of Civil Appeals of Texas.

The suit of People vs. Remington (121 N. Y., 328) is a similar action.

The Receiver is the only person in possession of the assets of an insolvent National Bank in the jurisdiction where the creditors reside, and where the bank is located, and most of its business, of course, is transacted. It would be inequitable to force creditors to carry on litigation in Washington against the Comptroller of Currency to compel the proper allowing of dividends and distribution of the assets, and this has never been held or required in any case that I am familiar with. The principle is well settled that the Court will not send citizens out of the jurisdiction to litigate in other jurisdictions, touching assets and property within the jurisdiction of the Court, but will control the administration of a trust fund within its jurisdiction, and the assets of an insolvent bank form no exception to this rule.

Second Assignment of Error.

The second assignment of error is that the Court erred in rendering final decree

We submit, under the authorities cited above, that this was a correct and proper decree. It was exactly the decree made in Armstrong vs. American Exchange Bank (133 U. S., 442), and the decree made in Chemical National Bank vs. Armstrong (59 Fed. Rep. 382). In the latter case, a rehearing was granted on other questions, but did not effect the decree as to the proper method of arriving at the dividend to be allowed. The decree on the hearing is found in 65 Fed. Rep., page 573.

The decree in the case at bar, complained of, is not repugnant to either section 5234 or section 5236 of U. S.

Rev. Stats., and the Supreme Court evidently so construed the statutes in the case that I have referred to.

The statutes clearly mean that in the ordinary administration of the assets of a National Bank, the Receiver shall send the assets to the Treasurer of the United States, and the Comptroller shall order the dividends, but it will be noted in section 5236 that creditors have a right to have their claims adjudicated in a Court of competent jurisdiction.

This construction of the statute contemplates the right of a creditor to go into Court and establish his claim. The Receiver should report this decree to the Comptroller, and for his own protection get the directions of the Comptroller authorizing the payment.

The United States Circuit Court of Appeals modified the decree of the United States Circuit Court, by directing that a decree should only be entered against the Receiver of the bank recognizing and establishing the claim of the complainant below, the National Bank of Jacksonville, and the mode of declaring the pro rata distribution. And the Circuit Court of Appeals further decided that the Receiver could not be compelled to make an accounting of the assets in the United States Circuit Court, and could not be compelled directly by decree to make payment, and in these respects the decree and opinion of the United States Circuit Court of Appeals are favorable to the appellant here, and he has nothing to complain of in the opinion or decree of the United States Circuit Court of Appeals.

The Receiver is entirely protected in reference to his duty to transmit the money to the Treasurer by the opinion of the United States Circuit Court of Appeals.

There are a number of cases treating Receivers of National Banks as trustees and the jurisdiction for that purpose has always been maintained.

See Commercial Bank vs. Armstrong, 148 U. S., 50.

Massey et al. vs. Fisher, 62 Fed. Rep., 958.

Fisher vs. Knight, 61 Fed. Rep., 491.

Lake Erie & W. R. Co. vs. Indianapolis Nat'l. B'k. et al., 65 Fed. Rep., 690.

These suits were not identical in nature with the suit at bar, but they show the extent to which Courts have gone in treating Receivers of National Banks as trustees of the assets in their hands.

This decree does not seek to make a personal liability against the appellant, but treats him as having the title to the assets as a trustee or bailee, for the purpose of winding up the bank. The amount of the principal of the indebtedness due from the First National Bank of Palatka to the appellee was not disputed, and therefore no suit against the First National Bank of Palatka was necessary to establish said indebtedness. The matter in dispute was the proportion of the assets of the insolvent bank, which the appellee was entitled to have applied upon its admitted claim.

It was, therefore, necessary in order to settle this question, to bring before the Court the custodian of these assets, and the person within the jurisdiction of the Court in possession of the assets and who had the management and transaction of the business of the defunct bank, and this person was the Receiver and he, as such Receiver and managing custodian of the business and assets could properly be treated by the Court as a trustee, in reference to those assets, and directed to certify the claim to the Comptroller for payment upon the basis of distribution directed by the Court.

The act of Congress, section 5236 of the United States Revised Statutes, distinctly provides for the Comp-

troller's making dividends on claims proven to his satisfaction, "*or adjudicated in a Court of competent jurisdiction,*" and that is all that the decree in this case, as modified, amounts to.

I submit, therefore, that there was no error in the opinion and decree of the United States Circuit Court of Appeals, from which an appeal is taken to this Honorable Court in this cause, and that the same should be affirmed.

Respectfully submitted,

J. C. Cooper

Solicitor for Appellee.

No. 304.

Brief of Cooper for Appellee

Filed April 21, 1898.

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OCTOBER TERM 1897.

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BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

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amount received upon the collateral. The appellee contested this method of declaring dividends. This suit was brought to establish the right of the appellee to dividends based upon the total amount of its claim, without regard to collateral. The bill shows that the appellee was a creditor of the First National Bank for one class of indebtedness, consisting of sundry drafts, amounting to $6,010.47, and for another class of indebtedness, consisting of certificates of deposit, loans and interest, amounting to $10,093.34, making a total of $16,103.81 due the appellee from the First National Bank of Palatka on the 17th day of July, 1891. The appellee held certain collateral to secure the said last mentioned indebtedness of $10,093.34; said collateral amounting to $10,896.22, according to the face thereof. Complainant collected a portion of the collateral after insolvency of the bank, leaving a balance due on its said indebtedness, so secured by collateral of $4,496.44. The Receiver and Comptroller allowed the appellee dividends on this balance and dividends on the unsecured indebtedness, but refused to allow dividends on the total indebtedness from the date of insolvency, to-wit: based on the sum of $16,103.81. The contention of the complainant below, appellee here, was that the Receiver should have allowed the appellee to have proven its entire claim of $16,103.81, and should have received pro-rata dividends on the entire amount thereof.

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The bill was first demurred to, and the demurrer overruled, whereupon the Receiver filed his answer simply, in effect, alleging that he had no power to allow the claim. He did not deny that the complainant offered to prove its claim for the full amount when the claims were first presented, but only alleged that it did not express its dissent until the 15th of March, 1894. He answered that he had realized assets to the amount of $176,317.91; that he had paid, without stating when, the sum of $31,561.33 for expenses of the receivership; that he had transmitted to the Comptroller, without stating when, the sum of $143,849.03, and that some of the assets still remained in his hands undisposed of, but the Receiver failed to set out in his answer any statement of the assets remaining in his hands, or what assets remained in his hands on the 15th of March, 1894, or what disbursements he had made after the 15th of March, 1894, when he admits he had full notice of complainant's contention as to the proper mode of ascertaining and allowing dividends.

The Court overruled the exceptions to the answer, in effect holding, that the notice to the Receiver of complainant's right to dividends upon the basis of the entire indebtedness due to complainant was not given until the 15th of March, 1894. Thereupon the cause was set down upon the bill and answer and the Court made its decree in accordance with the case of Chemical National Bank

vs. Armstrong, declaring and adjudging the claim of the complainant, to wit: that it was entitled to receive from the assets of the First National Bank of Palatka, dividends upon the basis of its entire indebtedness of $16,103.81, but in order that no possible injustice should be done the Receiver, it further decreed that this dividend should be payable only out of the assets which were in his hands, when he admits he received notice of complainant's contention, to wit: on the 15th of March, 1894.

The Receiver did not in his answer state what assets he had on hand on the 15th of March, 1894, or what disbursements he had made after the 15th of March, 1894, or what moneys he had sent to the Comptroller after the 15th of March, 1894. The Court treating him as a trustee, ordered him to file an account showing the assets and disbursements on and after the 15th of March, 1894, the date on which he admitted receiving notice of complainant's claim.

The United States Circuit Court made its decree on the 29th of January, A. D. 1896 (found on pages 17 and 18 of the record).

On the 14th of March, 1896, the defendant below, T. B. Merrill, as Receiver, entered his appeal from the said decree to the United States Circuit Court of Appeals for the Fifth Circuit and assigned as error:

1st. The overruling of the demurrer to the bill.

2nd The entry of the said final decree (Page 18 of record).

On June 15, 1896, the United States Circuit Court of Appeals, Fifth Circuit, made its decree and filed its opinion reversing the decree of the Court below as to the form of the said decree, but establishing the right of

the appellee, complainant below, to prove its claims and to a pro rata distribution upon the entire amount of its indebtedness (See pages 26 to 33 of the record). And its mandate to that effect was duly filed in the United States Circuit Court for the Southern District of Florida on July 6th, 1896 (see page 23 of the record), and thereupon on the 27th day of July, 1896, the United States Court for the Southern District of Florida entered its decree in said cause in exact conformity to the mandate of the United States Circuit Court of Appeals (see pages 23 and 24 of the record). And on the 26 of September said defendant below, the appellant here, entered his appeal to the United States Circuit Court of Appeals from said decree of the United States Circuit Court of the 27th of July, 1896, and assigned as error the provisions of the said decree (see pages 25 and 26 of the record).

On November 16th, the appellee filed its motion in the United States Circuit Court of Appeals to dismiss the said appeal (pages 27 and 28 of the record), and on December 8th, 1896, the United States Circuit Court of Appeals entered its order dismissing the said appeal and rendered its opinion thereon (found on pages 30 and 31 of the record, and from this order of the 8th of December, 1896, the present appeal to this Honorable Court is taken by Merrill, as Receiver, who was the defendant below, and also the appellant in the said United States Circuit Court of Appeals for the Fifth Circuit.

The United States Circuit Court of appeals followed the case of Armstrong vs. Chemical National Bank, 59 Fed. Rep., 372 (16 U. S. App. 465).

In the latter case, it was held that the creditors of an insolvent National Bank in proving their claims cannot be required to allow any credit for collection from

collateral made subsequent to the declared insolvency of the bank and before the filing of the proof of claim.

On December 24th, 1896, the defendant below, the appellant here, T. B. Merrill, as Receiver, also entered his appeal to the Supreme Court of the United States from the said decree and opinion of the United States Supreme Court of Appeals of June 15th, 1896, which appeal is case number 300 on the docket of this court now.

This appeal should be dismissed.

This being an appeal from a decree of the United States Circuit Court of Appeals for the Fifth Circuit *dismissing* an appeal in that Court, no appeal lies from such order to this Court.

Section 6 of the act of Congress of March 3, 1891, provides that the judgments and decrees of the Circuit Courts of Appeal shall be final in certain cases, naming them, and further provides for said Circuit Courts of Appeals certifying questions or propositions to the Supreme Court of the United States for its determination, and also provides for the Supreme Court, by certiorari, or otherwise, reviewing decrees of the Circuit Courts of Appeal. None of these provisions cover the case at bar. Said section 6 also provides as follows: "In all cases not hereinbefore in this section made *final*, there shall be the right to appeal, or writ of error, or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed $1,000, besides costs."

It is evident from the language of the act, as well as from its plain purpose, that this right of appeal only exists from *final* decrees involving the *merits* of a controversy.

The case at bar is an appeal from an order *dismissing* an appeal in the United States Circuit Court of Appeals and does not come within the meaning or purpose of the act of Congress.

An order dismissing an appeal is not the final judgment or decree referred to in the act of Congress from which an appeal lies to this Court.

See Aspen Mining and Smelting Co. vs. Billings, 150 U. S. 34. And case there cited.

This appeal should be dismissed upon another ground.

The record shows that the appellant here was also the appellant in both of the appeals in the United States Circuit Court of Appeals, shown by the records here in cases Numbers 300 and 301.

The first decree and judgment of the United States Circuit Court of Appeals was made on the 15th of June, 1896, and is reported in the Federal Reporter, Vol. 75, p. 148. The mandate of the United States Circuit Court of Appeals was filed in the Circuit Court of the United States for the Southern District of Florida, July 16th, 1896. (See page 22–23 of the record.)

The appellant Merrill did not then take any appeal from the decree and opinion of the United States Circuit Court of Appeals, but permitted the mandate to be sent down to the Court below and the decree entered thereon in the United States Circuit Court on the 27th of July, 1896. (See pages 23 and 24 of the record.)

Such decree having been entered in the Court below, in pursuance of said mandate, and the cause having been

by this action remanded to the jurisdiction of the United States Circuit Court, the appellant waived any right of appeal from said judgment of the United States Circuit Court of Appeals of June 15th, 1896, and he ought not to be heard in this Court to complain of same where said decree has been entered in strict conformity to said mandate.

Aspen Mining & Smelting Co., vs. Billings, 150 U. S. 34.

In re Washington & Georgetown R. R., 140 U. S. 91.

Gaines vs. Rugg, 148 U. S. 228, 241.

Texas & Pacific Ry. vs. Anderson 149 U. S. 237.

We will consider the errors as assigned in the United States Circuit Court of Appeals and shown in the record on page 18.

ARGUMENT.

The decree of the United States Circuit Court of Appeals dismissing the appeal referred to in the Court was properly made, and is in exact accord with the decisions of this Court in similar cases, as an examination of the opinion of the Circuit Court of Appeals will show.

Each of the assignments of error on the said appeal in the United States Circuit Court of Appeals, numbered 1, 2, 3 and 4 (pages 24 and 25 of the printed record) are in effect arguments by the appellant that the United States Circuit Court of Appeals erred in its first opinion dated June 15th, 1896, when the cause was first before it. The second appeal, therefore, from the decree of the United States Circuit Court to the United States Circuit

Court of Appeals amounted in effect to an appeal to the said United States Circuit Court of Appeals from its own previous decision, that is from itself to itself.

The Supreme Court of the United States, in the case of Stewart vs. Salaman, 97 U. S., 361, decided that an appeal would not be entertained in that court from a decree entered in the Circuit Court, or other inferior Court, in exact accordance with a mandate upon the previous appeal. Such a decree, when entered, would be in effect the order and decree of the Appellate Court. See also McKall vs. Richards, 116 U. S., 45.

If, however, this Honorable Court, on this appeal concludes to review the merits of the cause, we say the opinion and decree of the United States Circuit Court of Appeals of June 15th, 1896, and the decree of the United States Circuit Court of the 27th of July, 1896 (found on pages 23 and 24 of the record), made in pursuance of said opinion of the United States Circuit Court of Appeals are correct and should be affirmed.

First assignment and first specification of errors too indefinite.

The first assignment, found on page 18 of the record is in the following language: "First. Because the Court erred in rendering the decree overruling defendant's demurrer to the bill of complaint herein."

The first specification is as follows: "First. The overruling of the defendant's demurrer to the bill of complaint."

This assignment and this specification point out no error that this Court will examine. The office of an assignment of error and of the specification in the brief is

to indicate in the said assignment and in the specification the exact question sought to be raised and which the Court is asked to decide. This Court and other Federal Courts have held that where the assignment and specification does not point out the exact question to be decided, it will not be considered.

Noonan vs. Caldonia Mining Co., 121 U. S., 400.

Patrick vs. Graham, 132 U. S., 627.

City of Lincoln vs. Sun Vapor St. Lt. Co., 59 Fed. Rep., 758.

F. C. & P. R. R. Co. vs. W. B. Cutting, et al., 68 Fed. Rep. 586.

If the Court shall determine to examine the demurrer to the bill, and the argument in the brief for appellant thereon, we maintain that the demurrer was properly overruled. In the argument, the only contention made against the bill seems to be in alleged indefiniteness in the allegations of the bill. No such ground was raised in demurrer, and it does not appear in the demurrer.

(See page 7 of the printed record.)

The three grounds set forth in the demurrer were:

1st. Want of equity.

2nd. A denial of the rule of distribution, which had been decided in the case of Chemical National Bank vs. Armstrong.

3rd. Estoppel.

None of these contentions were well taken. The bill is sufficiently definite to have settled and decreed the basis on which the complainant was entitled to a dividend. The bill states the total amount of the indebtedness due complainant. It states separately the amounts

for which it held collateral, and those which were unsecured, and it states the amount received on the collateral and separately the dividends on the two classes of claims, which the Comptroller and Receiver has allowed and paid. This data gave the Court everything needed upon which to frame a decree. On the points actually made in the demurrer, and which demurrer was overruled, we assert the Court properly decided the demurrer was not well taken.

Appellee was entitled to prove its claim for the full amount without regard to the collateral.

The case of Chemical National Bank against Armstrong (59 Fed. Rep. 372), decided by the Circuit Court of Appeals for the Sixth Circuit, is conclusive of this case. The facts in both cases are almost identical. In that case, just as in the case at bar, the Chemical National Bank, a creditor of the defunct Fidelity National Bank, held certain collateral, which Armstrong, the Receiver of the Fidelity Bank, required it to collect and apply to the debt, and then to make proof of the balance of the debt. The lower court sustained the view of the receiver, but the Appellate Court (consisting of Circuit Justice Brown and Judges Lurton and Taft) reversed the holdings of the lower court, and permitted the Chemical National Bank to prove its claim without regard to the collateral it held.

Judge Taft, speaking for the Court, asks in this opinion: "Shall creditors of an insolvent national bank, in proving their claims, be required to allow any credit for collections from collateral made subsequent to the declared insolvency and before proof of claim."

This question is answered in the negative, the same Judge saying:

"The great weight of authority in England and in this country is strongly opposed to the view that a creditor with collateral shall be thereby deprived of the right to prove for his full claim against an insolvent estate."

The opinion in this case is an able and exhaustive review of all the authorities on the subject, and is an authoritative exposition of the law of the case at bar.

See Chemical Nat. Bank vs. Armstrong, 59 Fed. Rep. 372, and cases there cited.

The elements of an estoppel are not present in this case.

It is objected by the demurrer that the complainant is estopped to bring this suit, although upon what grounds the alleged estoppel rests it is not clear.

The bill does not show that the Receiver has been led by the acts of the complainant to take any position, or do any act, which he would not otherwise have done, and which resulted in an injury to the rights of the creditors. It is particularly and specifically alleged in the bill: "That in addition to proving the amount of $6,010.47 due on sundry drafts as aforesaid, your orator offered to prove up its claim for $10,000.00, being amount of certificate of deposit secured by collateral as aforesaid, but the said defendant Receiver would not permit your orator to prove the total amount of $10,000.00 and interest due thereon for said loan as aforesaid, but under the ruling of the Comptroller of the United States of America your orator was not allowed to prove its claim in full before the defendant Receiver, but was ordered to first exhaust the collateral given to secure said loan for $10,000.00 as aforesaid, and then to prove the claim for the difference between the amount of the loan and interest, and the amount realized from said collateral."

"That your orator gave due notice that it would demand a pro rata dividend upon the whole amount due your orator, without deducting the amount collected on collateral security, to wit: that it would demand a pro rata dividend upon $16,103.81 and interest thereon from the 17th day of July, A. D. 1891."

Nothing could be more specific than the allegations contained in the bill that the defendant had full notice of the complainant's claim at the time proof was made. The fact that complainant was forced for the time, by a species of duress, to be governed by the rulings of the Receiver, did not invest this case with the qualities of an estoppel. The other creditors of the insolvent bank have not been harmed, but rather benefited, by the rulings of the Receiver, and for the complainant to endeavor now to assert a perfect legal right of which it had been deprived by the action of the Receiver, is as far as it possibly could be from a case of estoppel.

The same contention, which is sought to be made here against the complainant, was distinctly overruled by the Texas Civil Court of Appeals in the case of Hunt vs. Smart, 28 Southwestern Rep., 63, decided October 24th, 1894. In that case the appellee sought recognition as a preferred creditor, after having already proved his claim as a general creditor, the claim being sustained in the trial court. "The Receiver brings this case to us with the contention that the appellee has lost his right to a preference, and is estopped from claiming as a special creditor by reason of his action in proving up his claim before the Receiver, and allowing himself to be considered as a general creditor until after the assessment had been levied on each share of stock."

The Court dismissed the contention of the Receiver, saying: "That in order for an estopped to exist it must

appear that his action has led to a condition of things which would cause other creditors to lose some right if he is now being admitted to a preference."

It is true the payment of the claim in full, says this Court, would reduce the dividends of the other creditors, but the right of priority exists from the accrual of the preferred claim, and the remaining creditors lost no rights or advantages by allowing the appellee's claim, since they never had any rights or advantages over him. "On the contrary, if the appellee is refused preference, they (the other creditors) will acquire an advantage not justly due to them."

This reasoning applies with irresistible force to this case. Especially so, since the allegation is made with all possible distinctness that the complainant offered, in the first instance, to prove its claim for the full amount, which the Receiver would not permit.

This is a trust estate.

The trust sought to be enforced by the bill is still open and unexecuted. The Receiver was at the time the bill was filed, and still is, in possession of the assets of the defunct bank. The assets of the bank have not yet been fully distributed, and one of the grounds upon which this bill rests is the delay in closing the affairs of the bank. From the time of the payment of the first dividend to the filing of the bill there has been only one year and nine months, a period entirely insufficient to raise any presumption of laches by complainant.

It is shown by the bill that the Receiver is still in the active management of the bank. His position is that of a trustee administering an active trust, and any bene-

ficiary of that trust has a right to apply to the proper court to have the trust administered in accordance with law. So long as this trust is in the process of administration, the complainant has an undoubted right to have the Receiver's acts controlled by this Court. Any other doctrine would result in depriving the complainant and every other creditor of the bank of the protection of the Court from the unauthorized and illegal acts of an officer in the discharge of a trust.

"Laches is not like limitations, a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced—an inequity founded on some change in the conditions or relations of the property or the parties."

Galliher vs. Caldwell, 145 U. S., 368.

Godden vs. Kimmell, 99 U. S., 201.

Mackall vs. Casilear, 137 U. S., 556.

In this case the enforcement of the complainant's rights would work injury to no one. On the contrary, it would be highly inequitable to debar this, and all other creditors similarly situated, from availing themselves of the protection of this Court from the arbitrary and illegal acts of the Receiver.

The authorities cited by the appellants in the United States Circuit Court of Appeals to sustain the demurrer, to wit: Commonwealth vs. Mechanics National Bank, 94 U. S., 437, have no application. That was a suit by one bank against another, to wit: by a creditor bank against an insolvent bank for interest but it does not hold that the creditor may not treat the Receiver as the trustee of the property within the jurisdiction of the Court, and have its claim adjudicated in a suit against the Receiver.

The other case cited by the appellant in the United States Circuit Court of Appeals of Hitz vs. Jenks, 123, U. S., 297, in no respect sustains the demurrer to the bill. This was an effort by the receiver to enforce a deed in the nature of a mortgage, and to cancel certain deeds made after the mortgage, and by cross-bill by the defendant, Mrs. Hitz, to cancel the mortgage. The Court decided that the notary's certificate could not be disputed. which set forth the private examination of a married woman, and properly held that all of the rents of the property were applicable to the mortgage indebtedness. There is nothing in this decision which conflicts with the numerous decisions in which Receivers of national banks have been treated as trustees and sued as such.

The United States Circuit Court had power to enter a decree against the Receiver.

In the cases of Armstrong vs. American Exchange Bank, 133 U. S., 433, decrees against the Receiver Armstrong were affirmed.

In one case (see page 438) the prayer of the bill was for a decree that the claim with interest be adjudged a valid claim against the estate in the hands of the defendant as receiver, and that he be directed to satisfy it by paying dividends upon it from the assets of the Fidelity Bank. After a hearing on pleadings and proofs, a decree was entered (see page 439) directing the Receiver to allow the claim for the full amount against the assets in his hands as Receiver, and to satisfy it by paying such dividends as he had made theretofore and as should be made thereafter from the assets of the Fidelity Bank, in the due course of administration, and to pay the dividend of 25

per cent already declared with interest from that date to date of payment.

In the other case (see page 440) the prayer of the bill was for a decree that the claim is a valid claim against the assets in the hands of the defendant as Receiver, and that he be directed to satisfy it by paying dividends upon it from the assets of the Fidelity Bank in the due course of administration. The decree in this case, found on page 443 of the opinion, adjudges that the claim is a valid one for the full amount against the assets in the hands of the defendant as Receiver, and directs him to satisfy the same by paying thereon such dividends as had been made theretofore, and should be made thereafter from the assets of the Fidelity Bank in the due course of administration, and to pay the dividend *already declared*, with interest from that date until the time of payment.

The Court examined the facts in all these cases and decided (see page 459) that the decree in the first case was right, and on page 470 decided that the Circuit Court was right in making a decree against the Receiver in number 111 and affirmed the right of the complainant to interest on the dividend theretofore declared, and that both the decrees be affirmed.

In both of these cases demurrers had been interposed and overruled, dividends of 25% had been paid to the other creditors some time before these were adjudicated in favor of complainants in those suits, but the Court below and Circuit Court of the United States entered decrees against the Receiver, and ordered him to pay out of the assets not only the dividends thereafter accruing, but those theretofore accrued, with interest. We think it is therefore clear that the Receiver is treated as a trustee administering the assets of an insolvent estate, and when it

is necessary for a creditor to go into Court to establish his rights, he may get a decree against the assets.

Assets of insolvent banks subject to decrees of United States Courts.

In case of Richmond vs. Irons, 121 U. S. page 127, a bill by creditors to enforce stockholders liability was sustained and while the suit was pending, a receiver of the bank was appointed. The court treats the assets of an insolvent bank as subject to distribution under the decrees of a court of equity, on general equity principles.

In the case of National Bank vs. Colby (21 Wallace 609), it was determined that the title to the assets of the bank was transferred to the Receiver.

In the case of Pacific National Bank vs. Mixter, 124 U. S., page 724, the assets are treated as passing to the Receiver.

In Scott vs. Armstrong (146 U. S., 499) the Supreme Court of the United States upheld the right of set-off of creditors of the bank against suits brought by a Receiver of the bank.

If the Receiver can sue the debtors of a bank, and the debtor may by a cross action, in the nature of a plea of set-off, recover against the Receiver, there can be no reason why suit may not be maintained in the first instance by creditors of the bank against the Receiver for distribution of the assets of the bank.

The case of Hunt vs. Smart, 28 S. Rep., 63, is a suit against a Receiver of an insolvent National Bank, to establish a preferred claim, and was sustained by the Court of Civil Appeals of Texas.

The suit of People vs. Remington (121 N. Y., 328) is a similar action.

The Receiver is the only person in possession of the assets of an insolvent National Bank in the jurisdiction where the creditors reside, and where the bank is located, and most of its business, of course, is transacted. It would be inequitable to force creditors to carry on litigation in Washington against the Comptroller of Currency to compel the proper allowing of dividends and distribution of the assets, and this has never been held or required in any case that I am familiar with. The principle is well settled that the Court will not send citizens out of the jurisdiction to litigate in other jurisdictions, touching assets and property within the jurisdiction of the Court, but will control the administration of a trust fund within its jurisdiction, and the assets of an insolvent bank form no exception to this rule.

Second Assignment of Error.

The second assignment of error is that the Court erred in rendering final decree.

We submit, under the authorities cited above, that this was a correct and proper decree. It was exactly the decree made in Armstrong vs. American Exchange Bank (133 U. S., 442), and the decree made in Chemical National Bank vs. Armstrong (59 Fed. Rep. 382). In the latter case, a rehearing was granted on other questions, but did not effect the decree as to the proper method of arriving at the dividend to be allowed. The decree on the hearing is found in 65 Fed. Rep., page 573.

The decree in the case at bar, complained of, is not repugnant to either section 5234 or section 5236 of U. S.

Rev. Stats., and the Supreme Court evidently so construed the statutes in the case that I have referred to.

The statutes clearly mean that in the ordinary administration of the assets of a National Bank, the Receiver shall send the assets to the Treasurer of the United States, and the Comptroller shall order the dividends, but it will be noted in section 5236 that creditors have a right to have their claims adjudicated in a Court of competent jurisdiction.

This construction of the statute contemplates the right of a creditor to go into Court and establish his claim. The Receiver should report this decree to the Comptroller, and for his own protection get the directions of the Comptroller authorizing the payment.

The United States Circuit Court of Appeals modified the decree of the United States Circuit Court, by directing that a decree should only be entered against the Receiver of the bank recognizing and establishing the claim of the complainant below, the National Bank of Jacksonville, and the mode of declaring the pro rata distribution. And the Circuit Court of Appeals further decided that the Receiver could not be compelled to make an accounting of the assets in the United States Circuit Court, and could not be compelled directly by decree to make payment, and in these respects the decree and opinion of the United States Circuit Court of Appeals are favorable to the appellant here, and he has nothing to complain of in the opinion or decree of the United States Circuit Court of Appeals.

The Receiver is entirely protected in reference to his duty to transmit the money to the Treasurer by the opinion of the United States Circuit Court of Appeals.

There are a number of cases treating Receivers of National Banks as trustees and the jurisdiction for that purpose has always been maintained.

See Commercial Bank vs. Armstrong, 148 U. S., 50.

Massey et al. vs. Fisher, 62 Fed. Rep., 958.

Fisher vs. Knight, 61 Fed. Rep., 491.

Lake Erie & W. R. Co. vs. Indianapolis Nat'l. B'k. et al., 65 Fed. Rep., 690.

These suits were not identical in nature with the suit at bar, but they show the extent to which Courts have gone in treating Receivers of National Banks as trustees of the assets in their hands.

This decree does not seek to make a personal liability against the appellant, but treats him as having the title to the assets as a trustee or bailee, for the purpose of winding up the bank. The amount of the principal of the indebtedness due from the First National Bank of Palatka to the appellee was not disputed, and therefore no suit against the First National Bank of Palatka was necessary to establish said indebtedness. The matter in dispute was the proportion of the assets of the insolvent bank, which the appellee was entitled to have applied upon its admitted claim.

It was, therefore, necessary in order to settle this question, to bring before the Court the custodian of these assets, and the person within the jurisdiction of the Court in possession of the assets and who had the management and transaction of the business of the defunct bank, and this person was the Receiver and he, as such Receiver and managing custodian of the business and assets could properly be treated by the Court as a trustee, in reference to those assets, and directed to certify the claim to the Comptroller for payment upon the basis of distribution directed by the Court.

The act of Congress, section 5236 of the United States Revised Statutes, distinctly provides for the Comp-

troller's making dividends on claims proven to his satisfaction, "*or adjudicated in a Court of competent jurisdiction*," and that is all that the decree in this case, as modified, amounts to.

I submit, therefore, that there was no error in the opinion and decree of the United States Circuit Court of Appeals, from which an appeal is taken to this Honorable Court in this cause, and that the same should be affirmed.

Respectfully submitted,

J. C. Cooper

Solicitor for Appellee.